

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

TAWANDA HALL, CAROLYN MILLER,  
AMERICAN INTERNET GROUP, LLC,  
ANTHONY AKANDE, CURTIS LEE and  
CORETHA LEE, MARCUS BYERS and  
KRISTINA GOVAN, individually and  
all those similarly situated in  
the City of Southfield,

Plaintiffs,

v.

HON. PAUL D. BORMAN  
No. 20-cv-12230

OAKLAND COUNTY TREASURER ANDREW  
MEISNER, in his official and  
individual capacities, OAKLAND COUNTY,  
SOUTHFIELD NEIGHBORHOOD REVITALIZATION  
INITIATIVE, LLC, CITY OF SOUTHFIELD,  
FREDERICK ZORN, in his official and  
Individual capacities, SOUTHFIELD  
MAYOR KENSON SIVER, in his official  
and individual capacities, SOUTHFIELD  
NON-PROFIT HOUSING CORPORATION, HABITAT  
FOR HUMANITY OF OAKLAND COUNTY INC.,  
SUE WARD-WITKOWSKI, in her former  
official and individual capacities,  
GERALD WITKOWSKI, in his official  
and individual capacities, TREASURER  
IRVIN LOWENBERG, in his official  
and individual capacities, MITCHELL  
SIMON and E'TOILE LIBBETT,

Defendants.

**DEFENDANTS' MOTION TO DISMISS**  
(Held Via Videoconference)

**BEFORE U.S. DISTRICT JUDGE PAUL D. BORMAN**  
231 West Lafayette Boulevard  
Detroit, Michigan  
**Tuesday, May 18, 2021**  
**10:30 a.m.**

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DEFENDANTS' MOTION TO DISMISS

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May 18, 2021

Detroit, Michigan

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(Court and Counsel present, 10:30 a.m.)

THE COURT: Okay. Good morning. This is Judge Paul Borman presiding in Hall, et al. v. Oakland County Treasurer and Oakland County, et al., Civil Case Number 20-12230. Today is Tuesday, May 18th, 2021, 10:30 a.m. Parties to this proceeding from the court are Court Deputy Deborah Tofil, Court Reporter Leann Lizza, and Career Law Clerk Jennifer Eble.

Attorneys on this matter dealing with Oakland County Defendants' motion to dismiss are plaintiff, please state your name and spell your name.

MR. BLAKE: Jayson Blake, Your Honor. J-A-Y-S-O-N, B-L-A-K-E, on behalf of all plaintiffs.

THE COURT: Okay. And for Oakland County defendants?

MR. HORTON: Good morning, Your Honor. William Horton on behalf of Oakland County and its Treasurer Meisner. Last name is H-O-R-T-O-N.

THE COURT: Okay. Thank you.

Each side will have up to 30 minutes for argument. The moving party in this case, the defendants, will have up to five minutes for rebuttal. Please speak slowly, loudly and clearly. If you mention a name other than a plaintiff's name or defendant's name, or Jones or Smith or Borman, spell it.

**ARGUMENT BY MR. HORTON**

1 Also, spell case names and cite to them.

2 Counsel for defendant, please proceed.

3 MR. HORTON: Thank you, Judge. I appreciate the  
4 opportunity to have 30 minutes, but I can guarantee you I won't  
5 take anywhere near that amount of time. The short version,  
6 Judge, is that I know you carefully read these papers before we  
7 get to this stage. You know, this is a post-foreclosure  
8 challenge to what occurred post-foreclosure because there was  
9 actually a foreclosure case, and then as to some of the  
10 plaintiffs there was -- they filed a separate case in Oakland  
11 County Circuit Court which was dismissed and not appealed. So  
12 I really want to make just three points very briefly.

13 The first one is as to plaintiffs Miller -- there's a  
14 corporate plaintiff named American Internet Group and an  
15 individual by the name of Akande, A-K-A-N-D-E, and we believe  
16 their claims are clearly barred by res judicata. They were  
17 plaintiffs in the post-foreclosure lawsuit in Oakland County,  
18 and their claims were dismissed and they were unappealed and  
19 they were final judgments. We clearly believe that under the  
20 Full Faith and Credit Act and under the full faith and credit  
21 clause of the Constitution that this court needs to afford that  
22 Oakland County judgment res judicata and it bars those persons'  
23 claims. Those are just some of the plaintiffs, Judge. And by  
24 the way, we've attached to our motion the papers that were  
25 filed in Oakland County Circuit Court that results in the

## ARGUMENT BY MR. HORTON

1 judgment in that case.

2 Second, Judge, there's a plaintiff by the name of  
3 Byers, B-Y-E-R-S, and we claim that he lacks standing as  
4 indicated by the papers, the complaint and the papers that are  
5 attached to the plaintiffs' complaint. In 2008, I believe it  
6 was, according to the plaintiffs' complaint, the property was  
7 conveyed by the bank which owned it, Wells Fargo, to Mr. Byers'  
8 former wife, Debbie Byers. And, geez, I'm having a hard time  
9 reading the Page ID on this right now, Judge. Oh, it's page 51  
10 which is an exhibit to their complaint. It clearly says that  
11 on July 17th of 2008, ten years before the foreclosure, that  
12 the property was conveyed to his wife. There's never been any  
13 dispute since then that, in fact, Debbie Byers, not the  
14 plaintiff, I can't remember his first name, the -- Mr. Byers --

15 THE COURT: That would be Marcus, M-A-R-C-U-S.

16 MR. HORTON: Thank you, Judge. There has never been  
17 any evidence or claim to the contrary except in the response  
18 brief by the plaintiffs. They submitted a quitclaim deed from  
19 Debbie Byers to Marcus Byers dated 2020, two years after this  
20 foreclosure occurred. Clearly I think under anybody's  
21 understanding of real estate law, you can't give what you don't  
22 have, and she didn't -- no longer had title to the property  
23 because it had been foreclosed in 2018. That really just deals  
24 with these four plaintiffs or so, but there's additional  
25 plaintiffs involved. And as to all of the plaintiffs,

## ARGUMENT BY MR. HORTON

7

1 plaintiffs fail to state a claim against Oakland County or its  
2 treasurer. The basis for the claim, basically, Judge, is that  
3 we foreclosed on the property. Under the Michigan General  
4 Property Tax Act the municipality where the property is  
5 located, that being Southfield, is entitled to claim the  
6 property for the amount of what we call the minimum bid which  
7 is basically the amount of taxes that's owed, some fees, and  
8 some penalties and some interest. And Southfield, in fact, did  
9 that in this case related to these -- all of the plaintiffs.  
10 Southfield ex -- it's called -- under the statute it's called a  
11 right of first refusal. Southfield exercised its right of  
12 first refusal and paid to Oakland County this minimum bid  
13 amount which is the sum of those parts that I just mentioned.  
14 And our -- the fundamental basis of our motion is that the  
15 Michigan Supreme Court said in *Rafaeli versus Oakland County*  
16 which is --

17 THE COURT: Spell it.

18 MR. HORTON: Yeah. I'm sorry. R-A-F-A-E-L-I versus  
19 Oakland County established a right of foreclosed persons in  
20 surplus proceeds that are produced at a tax auction, and says  
21 basically -- they say not basically -- exactly what they say is  
22 that the property owner only has a property interest in the  
23 proceeds that are generated at a tax auction which exceed that  
24 minimum bid. And as the Supreme Court said, they are entitled  
25 to no more or no less. In fact, that's what happened here,

## ARGUMENT BY MR. HORTON

8

1 Judge. We received exactly what we were entitled to. We  
2 received the minimum bid. And I think I put a little chart in  
3 the -- in our brief that lays it out and has the page  
4 references to the plaintiffs' complaint. In other words, these  
5 aren't our statements; these are the plaintiffs' statements.  
6 Let me find my little chart here.

7 On page 8 of our brief, Judge, it's Page ID 344, we  
8 recited for each one of the plaintiffs the amount that they  
9 claim that they owed in taxes and interest and penalties and  
10 that sort of stuff. And we also identified for you the portion  
11 of their complaint which says the amount that we received, and  
12 if you take a look at the little chart that we have in there,  
13 we received exactly the same amount that the plaintiff admits  
14 that were owed.

15 So the short version, Judge, is that Michigan Supreme  
16 Court has said that if there are excess proceeds produced at a  
17 tax auction beyond the amount of the minimum bid, the plaintiff  
18 may have a claim against them. But we received exactly that  
19 which we were entitled and, as the Michigan Supreme Court said,  
20 no more and no less.

21 Now, I understand also that the -- we've addressed  
22 some of the individual counts, but it all -- they all arise out  
23 of that basic premise, Judge. They may have claims as to other  
24 folks or different theories or something, but not as to Oakland  
25 County because the property right is established by state law



## ARGUMENT BY MR. HORTON

1 and the Michigan Supreme Court established it. They said that  
2 we're entitled to what we're owed, and the plaintiffs'  
3 complaint, as we've shown you in our brief, shows that we  
4 received exactly that what -- which we are owed.

5 Plaintiff has said -- and, Judge, I've had a lot of  
6 these cases, as you can imagine, after the Michigan Supreme  
7 Court decided this case. And some of the plaintiffs, in fact,  
8 counsel in this case where I've had other cases with him, has  
9 said, well, it's just not fair that --

10 THE COURT: Well, are you speaking about present  
11 counsel?

12 MR. HORTON: Yes.

13 THE COURT: Or are you speaking about initial counsel,  
14 Mr. Smith or the gentleman here, Mr. Blake?

15 MR. HORTON: Well, a little bit of both, I guess,  
16 Judge.

17 THE COURT: Okay.

18 MR. HORTON: Mr. Smith and I have litigated over a  
19 number of years, and Mr. Blake is kind of the new kid on the  
20 block, but he was involved in a case that Judge Lawson had  
21 which is called *Rose versus Oakland County* as well.

22 But the -- what the plaintiffs have said in *Rose* and  
23 in other cases and have suggested in this case is that, you  
24 know, if the case does not go to a tax auction and the  
25 municipality exercises its right of first refusal, it's just

1 not fair because there are no surplus proceeds produced and,  
2 geez, that's just not fair to us. But this was something that  
3 was addressed in the Michigan Supreme Court, Judge. The  
4 Michigan Supreme Court case, the *Rafaeli* case that we talked  
5 about, there was a seven-zero opinion -- or judgment, but it  
6 was two opinions. There was six justices signed onto the  
7 majority opinion, and Judge Viviano had a concurrence in the  
8 judgment but wrote separately. And he specifically addressed  
9 this situation where a municipality exercises its right of  
10 first refusal. And Judge Viviano goes on for two or three  
11 pages and says, you know, this is just not fair. So this issue  
12 was raised --

13 THE COURT: You say it's not fair. What do you mean  
14 is not -- what is not fair?

15 MR. HORTON: Judge, Justice Viviano was saying if the  
16 property is valuable but the foreclosing governmental unit,  
17 which is me, Oakland County, the city exercises its right of  
18 first refusal, even though everybody believes that the property  
19 is worth more than that minimum bid, it's just not fair that  
20 the plaintiff can't try to recover that lost equity. That  
21 argument was expressly rejected by the Supreme Court, the  
22 Michigan Supreme Court majority.

23 So my point, Judge, is that this isn't an issue that  
24 was open and unaddressed or not -- and I was involved in the  
25 Michigan Supreme Court court case as well with *Rafaeli* all the

## ARGUMENT BY MR. BLAKE

11

1 way up. And this was an issue that was hotly contested. It  
2 was addressed by Justice Viviano and it was addressed by the  
3 other judges, and Justice Viviano's view of the world was  
4 unsuccessful. It was rejected by the majority, Judge.

5 So the short version is *Rafaeli* which, you know, as  
6 you know, property rights are created by state law. The  
7 Michigan Supreme Court created a property right and  
8 post-foreclosure surplus proceeds and defined it very clearly  
9 and succinctly which is after a tax auction if the amount of  
10 money received is in excess of the minimum bid, then the former  
11 property owner has a right to claim it. That is not the case  
12 in this situation, Judge. We received exactly what we're  
13 entitled to. It was foreclosed. We received the minimum bid  
14 from Southfield. And there is no surplus proceeds.

15 So short version, Judge, based on the Plaintiffs'  
16 complaint, papers attached to Plaintiffs' complaint show that  
17 we received only exactly what we were due and there is no  
18 surplus proceeds and there is no taking, and plaintiffs' claim  
19 should be dismissed. Thanks, Judge.

20 THE COURT: Okay. Thank you.

21 Okay. Let me just get a sip of water and then I'll  
22 proceed.

23 Okay. Mr. Blake, please.

24 MR. BLAKE: Good morning, Your Honor. Once again,  
25 Jayson Blake on behalf of all the plaintiffs appearing along

## ARGUMENT BY MR. BLAKE

12

1 with our co-counsel, Scott Smith.

2 I will address the points made by Mr. Horton and  
3 Oakland County in order, but first I want to make a global  
4 statement clarifying what this case is about and what it's not  
5 about. I think that would be helpful.

6 The plaintiffs each owned homes in the City of  
7 Southfield. Those homes were paid off, owned free and clear  
8 with no mortgage. Those homes were not blighted. They were  
9 not eyesores. They were lived-in homes. And I looked, I just  
10 checked yesterday, they're valued currently between 125 and  
11 \$385,000.

12 Unfortunately, those plaintiffs all fell behind on  
13 their property taxes. And the amounts they're owed are in the  
14 complaint. They range from \$2,000 to \$30,000, and there was  
15 one outlier who owed a larger amount, 43,000.

16 So by simple math, each of these plaintiffs had  
17 anywhere between 85,000 and one had \$285,000 in equity in their  
18 homes, a little bit less at the time the complaint was filed,  
19 but we are talking about very significant sums of money here.

20 Oakland County foreclosed on those homes and took  
21 title to those homes. Those homes were then transferred to the  
22 City of Southfield for the amount of the unpaid taxes under the  
23 previous statute -- previous version of the statute  
24 MCL 211.78m. City of Southfield then transferred those homes  
25 for a dollar to a for-profit entity, SNRI, which was controlled

## ARGUMENT BY MR. BLAKE

13

1 in part by its mayor and its city manager. Those properties  
2 were then sold to the public --

3 THE COURT: Why don't we just spell for the record,  
4 Mr. Blake. SNRI stands for Southfield Neighborhood  
5 Revitalization Initiative. Am I correct?

6 MR. BLAKE: You are correct, Your Honor.

7 THE COURT: Okay. Just to help the record. Okay. Go  
8 ahead.

9 MR. BLAKE: So those properties were then sold to the  
10 public for much higher amounts. One of them was sold for --  
11 Miss Hall's home was sold for \$308,000 and the proceeds went to  
12 the for-profit company. And we don't know for sure how or to  
13 whom those proceeds were ultimately distributed. Our focus in  
14 this case is on the loss of that equity. Our focus is not on  
15 the foreclosure. It's on what happened after the foreclosure.  
16 Anything in the complaint that seems to be complaining about  
17 the foreclosure process, and there were some issues with it,  
18 but that should be viewed as background for our claims today  
19 which are about the equity. We contend that the loss of that  
20 equity was a taking under the Michigan and the U.S.  
21 Constitution.

22 Now, as Mr. Horton pointed out, the Michigan Supreme  
23 Court has found in the *Rafaeli*, R-A-F-A-E-L-I, v. *Oakland*  
24 *County* case, which is 505 Mich. 429, that the government  
25 retention of surplus proceeds from a tax auction constitutes a

1 taking without justification under the Michigan Constitution.  
2 This case is a little different than *Rafaeli* in that the  
3 property was never sold at a public auction. And as we pointed  
4 out, those properties were transferred, Your Honor, to the City  
5 of Southfield under the right of first refusal under the former  
6 statute. We believe that process was just as unconstitutional  
7 as the process that was followed in *Rafaeli*. The Michigan  
8 legislature recognized after --

9 THE COURT: You're saying that process; you're talking  
10 about the *Rafaeli* decision said, okay, you get no more, no  
11 less. Here they got, Oakland County got what they said was due  
12 and then they're out of the picture, right?

13 MR. BLAKE: Well, *Rafaeli* was dealing with a different  
14 situation and it did say that in that situation where it went  
15 to auction you get what it's paid at the auction. I didn't  
16 say -- it didn't foreclose another opportunity for somebody in  
17 this situation. It didn't really deal with this situation  
18 directly that we're talking about right now other than in the  
19 dissent, in the concurring opinion by Justice Viviano where he  
20 talks about it and he says basically that this hasn't been  
21 addressed, he says -- you know, what happens in this type of  
22 situation. He doesn't say that -- none of the opinions say  
23 that somebody directly, that somebody under this particular  
24 statute gets nothing. It's not directly stated or there would  
25 have been a quote, you know, put out here in front of you that

1 says that.

2 But after *Rafaeli*, the Michigan legislature recognized  
3 that they had a problem because it changed the statute at issue  
4 at the end of 2020 to require, first of all, the surplus  
5 proceeds to be paid to the former homeowner, and the statute  
6 mentions that it's curative in nature and it references  
7 *Rafaeli*. But the legislature also changed the provision on the  
8 right of first refusal. It states that if the city wants to  
9 obtain the property, it must now pay either the unpaid taxes or  
10 the fair market value whichever is greater.

11 THE COURT: Now, that legislation came after all of  
12 these transactions had occurred previously.

13 MR. BLAKE: It did, Your Honor.

14 THE COURT: Okay. And the Court has not decided  
15 retroactive application of *Rafaeli*.

16 MR. BLAKE: Nobody has decided that although the  
17 statute mentions that it means it's something that's going to  
18 need to be decided at some point maybe in this case.

19 But our argument is if it's unconstitutional to take  
20 real property at foreclosure, sell it at auction and retain the  
21 proceeds as it clearly is under *Rafaeli*, that it should be  
22 equally unconstitutional to take the property but decline to  
23 hold an auction and transfer it to the city for only unpaid  
24 taxes and then depriving the homeowner of any chance of  
25 creating surplus proceeds.

1           We also contend that it is unjust enrichment for it to  
2 be transferred to the for-profit companies and they sold it,  
3 but that's not against Oakland County. So we hope that this  
4 case will establish this also as an unconstitutional process.  
5 Our core claims here are takings under the U.S. and the state  
6 Constitution and the unjust enrichment. The rest of the claims  
7 in the complaint are pled in the alternative.

8           I'll address the arguments in the motion to dismiss  
9 and maybe I'll come back to what I think the Court is perhaps  
10 troubled by. First of all, as to res judicata, some of the  
11 plaintiffs but not all of them did bring a civil action against  
12 some but not all the defendants in February of 2017. The state  
13 court action lists only one case of racial discrimination in  
14 the foreclosure process. It doesn't address anything happening  
15 after the foreclosure, and so it's not the same claims. And  
16 the current claims that we're making were not known to the  
17 plaintiffs at that time. Several of them hadn't even had their  
18 property transferred to Oakland County like Plaintiffs Hall,  
19 Plaintiff Byers. Plaintiff Govan's property had just  
20 transferred --

21           THE COURT: Let's spell the name. We got -- after  
22 Byers -- you did Hall, you did Byers and now you're talking  
23 about which plaintiff? Kristina Govan, K-R-I-S-T-I-N-A, and  
24 G-O-V-A-N, correct?

25           MR. BLAKE: Correct.



## ARGUMENT BY MR. BLAKE

17

1 THE COURT: Okay. Okay.

2 MR. BLAKE: Also, the *Rafaeli* case had not been  
3 decided yet at that point, so -- which makes clear that there  
4 was a viable cause of action. So you would be expecting these  
5 lay people who were facing eviction of their homes to pursue a  
6 cause of action that had not even been formally recognized yet  
7 at that time. Many of these plaintiffs had -- they were --  
8 had not been evicted yet. They weren't -- the whole process  
9 hadn't played out yet that we've set forth. They weren't aware  
10 of what would happen to their equity. They didn't understand  
11 yet that it had been taken from them and they wouldn't get  
12 nothing from their paid-off homes. And if you look in the  
13 complaint which I did, the original state court complaint, the  
14 word "equity" never appears. It never talks about anything  
15 after the foreclosure. These were people that were trying to  
16 avoid being kicked out of their homes is what that case was  
17 about.

18 So this is a very different thing. Now we're past  
19 that, we're past the foreclosure, and we're talking about what  
20 happens to the money that's in the home.

21 As far as the standings argument of Plaintiff Byers,  
22 we have contended in our complaint that he was the equitable  
23 owner of the home. His then-wife was appointed as his guardian  
24 in 1999 and she purchased it with his money and we pled that  
25 was held for him in a constructive trust. Now, that intent was

1 shown by the quitclaim deed that was attached to the response.  
2 And now I agree, that as of 2020 the property was already  
3 foreclosed and lost, so she couldn't really convey it back to  
4 him. But I think that that shows the intent, that the intent  
5 is that it was held by her in the constructive trust. It's  
6 what we pled. And if we need to add the ex-wife directly as a  
7 party, we can try to seek permission to do that. But that's  
8 what we pled is the constructive ownership.

9 So Counts 1 and 3 of the complaint are different  
10 iterations of our takings claims. We say, of course, this is  
11 [audio interrupted]. Plaintiffs were deprived of their property  
12 and the equity without just compensation. Oakland County says  
13 it can't be a taking because they only kept what was owed to  
14 them for the taxes. But the focus of the takings law and  
15 takings cases is not on what the takings party realized; it's  
16 on what the injured party lost. So it doesn't matter what they  
17 did with it or how they benefited from it; our plaintiffs still  
18 lost between 85 and \$285,000 in equity.

19 Oakland County didn't have to put that money into  
20 their own pocket or into their own coffers in order for it to  
21 be an unconstitutional taking. And the fact that they  
22 transferred the property to Southfield after taking it  
23 shouldn't absolve them if it was an unconstitutional process.  
24 Now, maybe that seems unfair to Oakland County. They say they  
25 were only following the law. But it's more unfair to our

1 plaintiffs. For most of these people this equity of their home  
2 was their entire life's savings. And Oakland County has sold  
3 many properties at auction and retained the surplus proceeds in  
4 other cases.

5 And Mr. Horton alluded he's had a lot of these other  
6 cases. So because they didn't do it here, it doesn't mean that  
7 they're blameless people. And, also, there's no requirement  
8 that we find a certain statement of mind in order to have a  
9 takings case. In many takings cases the taking parties, the  
10 governmental entity, is doing a good thing. They're taking  
11 property for some type of public use, and that's still a taking  
12 though. It doesn't matter what their reasoning was. We don't  
13 have to find them to be bad actors.

14 Now, in this case we have alleged some bad acts on  
15 behalf of Oakland County. We've alleged that they worked in  
16 concert with the City of Southfield to help identify properties  
17 with significant equity and no mortgage in order for Southfield  
18 to exercise their right of first refusal and they and the  
19 individuals we named all worked together in this process to  
20 essentially strip the equity. So I don't think that's enough  
21 to say, well, we just only realized what was owed to us  
22 because, again, the focus should be on what was taken from our  
23 clients not what they ultimately received. Unjust enrichment,  
24 that's important if they didn't actually get enriched. And  
25 that's why we didn't sue Oakland County for unjust enrichment

1 because we don't think the money came to their pockets. We  
2 sued the other parties who actually got the money for unjust  
3 enrichment.

4 So when we go back to the *Rafaeli* case, it holds, of  
5 course, that there is a property right to surplus proceeds  
6 after foreclosure. It holds that their proceeds are free from  
7 unlawful interference from the government entities, and the  
8 retention of those surplus proceeds is a taking. It wouldn't  
9 make sense for the law to permit them, the government, to  
10 circumvent someone's property right in their surplus equity by  
11 transferring it to a city and then refusing to hold an auction,  
12 saying, well, geez, I'm sorry, we would have given the money if  
13 we had an auction but we didn't have an auction, I guess you're  
14 out of luck. That's what they're essentially saying here, and  
15 I don't think that holds under the Constitution especially when  
16 there's so much money that they've gotten here.

17 Now, this is something that probably will need to be  
18 decided in some cases. We have Mr. -- or Justice Viviano  
19 bringing up this issue in the concurring opinion. We have  
20 another case in Oakland County, the *Jackson* case, which is the  
21 same factual pattern, the plaintiff lost at the trial court.  
22 He lost at the Court of Appeals, and then it went to the  
23 Supreme Court. Supreme Court remanded it for reconsideration  
24 in light of *Rafaeli*. Now, if *Rafaeli* didn't -- and we can  
25 infer and maybe we'll ultimately be wrong, but we can infer

1 that the Court thought that *Rafaeli* had some application to  
2 that case, to this fact pattern, and I think it does. So  
3 there's also a footnote in the *Freed* opinion, and I don't have  
4 the citation, but the remand *Freed* opinion from Justice -- or  
5 I'm sorry from Judge Friedman, Friedman --

6 THE COURT: Wait, let's talk about *Freed* just to get  
7 the citation. *Freed* is spelled F-R-E-E-D, v. *Thomas*,  
8 T-H-O-M-A-S, and it's 976 F.3d 729, Sixth Circuit, 2020, and it  
9 was an appeal from Judge Bernard Friedman in this case. Okay.  
10 Just to get that record straight. Okay, Mr. Blake. Please  
11 continue.

12 MR. BLAKE: Okay. I appreciate that.

13 I think there's ultimately going to have to be a  
14 decision made by some case somewhere. Nobody has directly  
15 dealt with this head on and said either these claims are good  
16 claims and they can proceed or that they're not good claims.  
17 But there are cases percolating out there including this one  
18 and including other ones. I think ultimately somebody's going  
19 to need to make a decision on this and Your Honor is as good as  
20 any to do that.

21 THE COURT: Thank you.

22 MR. BLAKE: We also think that there could possibly be  
23 a time and maybe this is the case where this question gets  
24 certified to the Michigan Supreme Court as to what happens in  
25 this case, how does *Rafaeli* -- what happens in a case where

1 there's not a public auction held because of that right of  
2 first refusal. And we're open to that as well.

3 I'm going to quickly go through the remaining counts  
4 because, as I said, those things are our alternative counts.  
5 For instance, Count 4, the Eighth Amendment, that's pled in the  
6 alternative to the taking of the equity constitutes excessive  
7 fines for the crime of not paying the property taxes. That's  
8 an alternative claim in this.

9 Count 5 is a procedural due process. Now, that claim,  
10 I think, should be because the defendants didn't provide  
11 adequate notice to plaintiffs that they would be taking the  
12 equity and they didn't provide a process by which the  
13 plaintiffs could collect it or make a claim. They didn't  
14 provide a process by which they could realize the surplus  
15 proceeds by action. The way it's pled now, and Your Honor  
16 knows we just came into the case, but the way it's pled now  
17 complains about the way the foreclosure avoidance agreements  
18 were handled preforeclosure. That's not the claim we want to  
19 make for procedural due process. It's good background  
20 information about the equity stripping scheme that we're  
21 alleging, but the procedural due process should really deal  
22 with the equity.

23 Count 6, the substantive due process claim, is also  
24 claimed in the alternative. If the retention of the equity is  
25 found not to be a taking, then it's substantive due process.

1 And there was an argument about whether or not behavior shocks  
2 the conscience or not and they say, well, it could be possibly  
3 because here we are following the law and that's all we're  
4 doing. The Michigan Court of Appeals in the *Jackson* case,  
5 state court case that we -- that I referenced, and I wish -- I  
6 don't have the cite, maybe I can find it in a minute -- wrote  
7 in that case that the behavior as alleged by the -- at least of  
8 the Southfield entities would shock the conscience. And I  
9 think that it would if, in fact, as we allege the city  
10 officials are working using that position, then they're also in  
11 a non -- I'm sorry, a for-profit company and they're realizing  
12 proceeds that way, that that's something that would shock the  
13 conscience.

14 And, finally, the unjust enrichment claim, we haven't  
15 made that case against Oakland County because, as Mr. Horton  
16 has said, the money didn't go into their pocket. So the other  
17 defendants though it did and that's who we pled that to.

18 Finally, I just want to make a couple general  
19 comments. As you said, we are new to this case. We signed on  
20 as co-counsel with Mr. Smith on a number of cases. We're also  
21 signed on as co-counsel in the *Edwards* case which is  
22 administratively stayed right now. But I think there may be  
23 some consolidation.

24 We would like to litigate this case and the issues in  
25 this case with precision and pursue these claims efficiently.

1 To the extent that the Court dismisses any claims, we would ask  
2 that you consider at least allowing us leave to file a motion  
3 to amend not to started adding more and more claims and  
4 expanding this but to really refine these claims with precision  
5 to get the right parties in the case and only the right parties  
6 and so forth.

7 And as I mentioned before, this may be a case where  
8 the question is appropriate to be certified with the Michigan  
9 Supreme Court, and we would potentially support the Court in  
10 doing that. We think this case has important issues of public  
11 policy as well as its obvious importance to the residents who  
12 lost their equity.

13 There are about 150 people in Southfield that we know  
14 of who had this happen to them. That's why I think this one  
15 has been pled as a potential class action, but we're asking the  
16 Court to allow us to move forward with these cases on their  
17 behalf. This is something that's happened to a lot of people.  
18 It's decimated their lives and their life savings. Certainly  
19 people have to pay taxes, we understand that. And if they  
20 don't, there has to be a mechanism to get those taxes. But  
21 this went far beyond that and took way more money. It is the  
22 logical next extension of the *Rafaeli* decision. There's  
23 nothing that prevents these people from pursuing these claims.  
24 There are cases -- this is the next step, this is the next  
25 frontier.



## FURTHER ARGUMENT BY MR. HORTON

1           So I will be happy to try to answer any questions the  
2 Court has, but those are my remarks for today.

3           THE COURT: No, don't have any questions. Very  
4 thorough. Thank you.

5           Okay. Rebuttal? Let me just get a drink of water and  
6 then we'll go to rebuttal.

7           Okay. Mr. Horton, please.

8           MR. HORTON: Thank you, Judge.

9           Very briefly, I just want to touch on a couple of  
10 things. Judge, as you know, the state law creates property  
11 law, and I actually looked up a couple of items here. The  
12 United States Supreme Court has repeatedly said that the United  
13 States Constitution does not create property rights but,  
14 rather, protects them. Property rights are determined by state  
15 law, and that is a state law does not establish a property  
16 right. There is no taking in its loss. I can give you the  
17 cites to those cases if you'd like, Judge.

18           THE COURT: Put them on the record. Go ahead.

19           MR. HORTON: Sure. For example, as to the protection  
20 rather than creation of property interests is *Phillips versus*  
21 *Washington Legal Foundation*, 524 U.S. 156 at page 164. The  
22 cases --

23           THE COURT: Is that the normal spelling, Phillips,  
24 P-H-I-L-L-I-P-S?

25           MR. HORTON: That's right, Judge.

## FURTHER ARGUMENT BY MR. HORTON

1 THE COURT: Versus?

2 MR. HORTON: Washington Legal Foundation.

3 THE COURT: Thank you.

4 MR. HORTON: And --

5 THE COURT: And the year? The year of that case?

6 MR. HORTON: 1998.

7 THE COURT: Thank you.

8 MR. HORTON: As to the proposition that property  
9 rights are determined by state law, there's a number of cases,  
10 but I'll just cite to you, it's kind of a funny name, *Stop the*  
11 *Beach Renourishment*, R-E-N-O-U-R-I-S-H-M-E-N-T, *versus Florida*  
12 *Department of Environmental Protection*, 560 U.S. 702 at page  
13 707, and that's a 2010 decision.

14 And the Sixth Circuit case that clearly states that if  
15 state law does not establish a property right, there is no  
16 taking is *Raceway Park*, R-A-C-E-W-A-Y, *Park versus Ohio*, 356  
17 F.3d 677 682.

18 The short version of all that, Judge, is that property  
19 rights are created by state law, and the Michigan Supreme Court  
20 has directly addressed that. What counsel indicates that he  
21 says, well, geez, I've lost my equity or my fair market value,  
22 the Michigan Supreme Court directly addressed that and  
23 expressly rejected that claim. At page 483 of the *Rafaeli*  
24 decision the Michigan Supreme Court said, "We reject the  
25 premise that just compensation requires that plaintiffs be

## FURTHER ARGUMENT BY MR. HORTON

27

1 awarded the fair market value of their properties."

2 And the second piece, Judge, is that Justice Viviano,  
3 there was some comment about it was just done in this some kind  
4 of abstract -- this right of first refusal was just addressed  
5 in the abstract. But that's not true. Justice Viviano at  
6 page 518 of his concurrence, here's the -- he goes on for about  
7 two pages. But here's the bottom line of what he says,  
8 "Consequently, the majority's view of the case would seemingly  
9 be that if the property does not sell at auction and is simply  
10 transferred to a governmental unit, the taxpayer is out of luck  
11 because there are no proceeds."

12 That's exactly what they're claiming about here,  
13 Judge. Justice Viviano tried to make that the majority opinion  
14 but he lost six-one. That's not the law in the State of  
15 Michigan.

16 Finally, Judge, and I think I mentioned this to you,  
17 there's a case that Judge Lawson had called *Rose versus Oakland*  
18 *County* and he just issued an opinion, similar situation. It's  
19 an exercise of a municipality's right of first refusal and he  
20 refused to reopen the case, and he said that it's undisputed  
21 that there were no surplus proceeds from the foreclosure  
22 because the City of Southfield used its right of first refusal  
23 to purchase the property. And here's what Judge Lawson's  
24 bottom line is. He says the *Rafaeli* decision offers no  
25 prospect of relief for the plaintiff under these circumstances.

## FURTHER ARGUMENT BY MR. HORTON

1 And he denied their motion to reopen.

2 THE COURT: Can you set the cite for Judge Lawson's  
3 case? I know it's Oakland County.

4 MR. HORTON: I can.

5 THE COURT: Okay.

6 MR. HORTON: 19-CV-13066. And I'm reading from ECF  
7 Number 60, Page ID 2134. And he just issued that --

8 THE COURT: Is there a Westlaw? Is there a Westlaw on  
9 that?

10 MR. HORTON: You know, I don't know, Judge. Quite  
11 frankly, [indiscernible] --

12 THE COURT: Okay.

13 MR. HORTON: He just issued that about ten days ago.

14 THE COURT: Okay. Wait a minute. I just want to help  
15 Mrs. Lizza. So it's *Rose versus Oakland County*, Judge Lawson,  
16 19-CV-13066. And do you have the date of that decision?

17 MR. HORTON: Yes. It's 4-28-21, April 28th.

18 THE COURT: 4-28. Okay, thank you so much.

19 MR. HORTON: And I'm reading from page 6 of that  
20 opinion. I mean that's -- I don't want to keep repeating  
21 myself, Judge. We got what we were entitled to and nothing  
22 more, and plaintiffs failed to state a claim against us. Thank  
23 you.

24 THE COURT: Okay. Thank you. The Court wants to  
25 congratulate both counsel for excellent oral argument. The

## FURTHER ARGUMENT BY MR. HORTON

1 Court will take it under advisement, render an opinion. Thank  
2 you all. We are concluded.

3 MR. HORTON: Thank you, Judge.

4 MR. BLAKE: Thank you, Your Honor.

5 (Proceedings concluded, 11:11 a.m.)

6 - - -

7 CERTIFICATION OF REPORTER

8

9 I, Leann S. Lizza, do hereby certify that the above-entitled  
10 matter was taken before me remotely via videoconference at the  
11 time and place hereinbefore set forth; that the proceedings  
12 were duly recorded by me stenographically and reduced to  
13 computer transcription; that this is a true, full and correct  
14 transcript of my stenographic notes so taken; and that I am not  
15 related to, nor of counsel to either party, nor interested in  
16 the event of this cause.

17

18

19 S/Leann S. Lizza 11-30-2021

20 Leann S. Lizza, CSR-3746, RPR, CRR, RMR, RDR Date

21

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